



POLICE DEPARTMENT CITY OF NEW YORK

February 12, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Robert Patterson
Tax Registry No. 944881
Transit Bureau Citywide Vandals Task Force
Disciplinary Case No. 2014-12273

Charges and Specifications:

1. Said Police Officer Robert Patterson, on or about September 20, 2013 at approximately 0200 hours, while assigned to the 107th Precinct and on duty, in the vicinity of 169th Street and Union Turnpike, Queens County, did wrongfully use force against Rogelio Diaz, in that he struck Rogelio Diaz with a vehicle.
P.G. 203-11 - USE OF FORCE

Appearances:

For CCRB-APU: Nicole Junior, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, New York 10007

For the Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street-Suite 640
New York, New York 10038

Hearing Dates:

August 27, October 19 and November 20, 2015

Decision:

Not Guilty

Trial Commissioner:

DCT Rosemarie Maldonado

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on August 27, October 19 and November 20, 2015. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. CCRB called Rogelio Diaz and Emily Alicea as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent not guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The following is a summary of the undisputed facts. During his September 20, 2013 tour, Respondent was operating an unmarked vehicle as he and Sergeant Lavelle conducted Anti-Crime patrol in the vicinity of Union Turnpike and 168th Street. (Tr. 124-25)

At about 0140 hours, Rogelio Diaz was standing with his pedal bicycle at 170th Street and Goethals Avenue in Queens waiting for his former girlfriend, Emily Alicea, to end her shift at the St. John's University campus convenience store. (Tr. 19, 78-79) When Alicea emerged, they proceeded down Goethals Avenue and turned right onto 169th Street. (Tr. 20-21, 80-81) He walked his bicycle next to Alicea as they proceeded down the middle of the street. Near 77th Road they saw a dark colored vehicle heading in their direction at a high speed. (Tr. 18, 21-23, 82-83) Diaz reacted by pedaling his bicycle toward Union Turnpike as Alicea ran in the opposite direction. (Tr. 24, 28, 85)

Respondent observed an Anti-Crime vehicle following a man on a bicycle. After a few seconds he joined the chase. (Tr. 31, 116-17) Near the intersection of 168th Street

and Union Turnpike, Diaz's bicycle and Respondent's vehicle collided. (Tr. 33, 119)

The force of the collision was such that Diaz fell off the bicycle, landing approximately five feet away. (Tr. 34, 119) Respondent exited his car, handcuffed Diaz and put him in a Department vehicle. Diaz was taken to the precinct and from there was transported by ambulance to New York Hospital in Flushing. (Tr. 120-23)

Diaz was admitted to the hospital at 0557 hours and diagnosed with "knee sprain" and "sprain and strain of unspecified site of knee and leg." (Tr. 35-37; CCRBX 2 at MR9) Notes from his physical exam indicated, "Left knee: Painful ROM (range of motion), tender to touch + deep abrasion over the patella, minimal bleeding (oozing), very limited in extension." (*Id.* at MR13) He was given Percocet and his knee was placed in an immobilizer. The doctor advised a consult with an orthopedist. (*Id.* at MR10, MR14, MR30-MR31) Diaz returned to the emergency room ten days later despite insurance issues due to left knee pain and "popping" in his right knee. The diagnosis was a "right patella tendon tear." (*Id.* at MR26) Diaz eventually had knee surgery and continues treatment via physical therapy. (Tr. 38) He did not initiate a lawsuit against the City or Respondent in connection with this incident. (Tr. 17)

In dispute is whether Respondent wrongfully used force against Diaz "in that he struck [him] with a vehicle." Diaz claims that Respondent ran into him with his car hitting his leg and the front wheel of his pedal bicycle. Respondent claims that he placed the car in the intersection to block Diaz and that Diaz failed to stop and crashed into the parked vehicle seconds later. Below is a summary of the relevant testimony in dispute.

Diaz testified that as he approached the corner of 169th Street and 77th Road with Alicea, a dark car came toward them from behind at a high rate of speed. He recounted

that the car was traveling against the flow of traffic, "really creepy, really fast," with no lights on. (Tr. 23-24, 42, 45) He described feeling "really scared," believing he was about to be hit or robbed. In response, he double backed by pedaling his bicycle toward Union Turnpike, passing the vehicle. (Tr. 24, 43-44) Although he did not know this was a police car, Diaz did not attempt to call 911 and did not stop to seek help at the Union Turnpike 7-11 or Dunkin Donuts that were open at that late hour. (Tr. 47-50)

Diaz made his way to 81st Avenue and then 168th Street (Tr. 29-30, 48; *see* CCRBX 1). As he attempted to turn left at the intersection of 168th Street and Union Turnpike, a dark car struck him from the right with a "pretty strong force." (Tr. 31-34, 55, 61) He fell off the bike hitting the ground about five feet away from the point of impact. (Tr. 34, 57-58)

Diaz recounted that he was bloodied and bruised, his legs felt numb, his head hurt and was unable to stand. (Tr. 34, 58-59, 68) He recalled three plainclothes officers exiting the car, handcuffing him and placing him inside a vehicle. (Tr. 35, 60, 65-66) According to Diaz, two additional plainclothes officers arrived thirty seconds later in a black car, but they immediately left the scene. (Tr. 59-60, 66) He heard the police ask about "drugs" but Diaz denied that he had any. (Tr. 35) He was charged with marijuana possession but the charge was later dismissed. (Tr. 39)

Emily Alicea confirmed that after she left work she and Diaz walked past Union Turnpike on 169th Street. As they approached the next corner, they heard a strange, "fast-moving noise" and then saw a dark colored vehicle "coming extremely fast full force down a one-way street" against traffic. (Tr. 82-84) No lights or sirens were activated,

and she did not hear anyone call out. According to Alicea, she and Diaz took off in opposite directions.

As she later approached the intersection of 168th Street and Union Turnpike, she heard Diaz screaming and then observed him being placed in the back of a dark colored vehicle. (Tr. 86) Alicea claims that she had "no idea" why he was being put in a vehicle. (Tr. 86, 91) She further noted that Diaz's bicycle was "destroyed" and "bent-up" in front. (Tr. 87) She followed the vehicle for a bit heading toward Union Turnpike and then walked home and called Diaz's grandmother. (Tr. 89) On cross-examination, Alicea agreed that she did not see what had happened to the bicycle nor what caused Diaz to cry out in pain. (Tr. 91)

Respondent testified that at approximately at 0200 hours, while located at 168th Street and Union Turnpike, he observed Officers Vygon¹ and Gannon, members of his Anti-Crime Unit, crossing over a median. (Tr. 109-10) Respondent explained that although he did not see their lights or sirens activated, driving in this manner was an unusual occurrence which meant they must have "seen something." (Tr. 110-11) He remained at his location for about twenty seconds, at which time he observed Vygon and Gannon's vehicle traveling southbound on 169th Street following an individual on a bicycle. Respondent drove southbound on 168th Street and turned onto 81st Avenue where he caught up with Gannon and Vygon as they followed the same individual. (Tr. 112-14)

¹ Neither Vygon nor Gannon testified at trial. The parties stipulated that Vygon had "the initial encounter with Diaz that began the pursuit of him that [Respondent] joined ... and Officer Vygon did not see the end of the encounter." As such, it was agreed that Vygon would not be able to testify to "the particulars of the specification against [Respondent]." (Tr. 104-05).

Respondent testified that Gannon and Vygon exited their vehicle on 81st Avenue to pursue Diaz on foot. He and Sergeant Lavelle did the same. (Tr. 114-15) Diaz, however, turned back to head toward 168th Street. At that moment, Respondent returned to his vehicle without Lavelle, drove in reverse down 81st Avenue and turned northbound onto 168th Street. (Tr. 115-16, 131) He observed Diaz pedaling on the west sidewalk of 168th Street. Respondent estimated that as he pulled up to the intersection of Union Turnpike and 168th Street, Diaz was seven to ten feet behind him. (Tr. 117) He positioned his vehicle diagonally at that southwest corner and came to a stop in an attempt to block Diaz's passage. (Tr. 117-19, 136-137) According to Respondent, seconds later Diaz "crashed into" the car. (Tr. 119, 139) Respondent handcuffed Diaz and a few seconds later the vehicle containing Gannon, Vygon and Lavelle approached to assist. (Tr. 122)

On cross-examination, Respondent conceded that he did not know what had caused Gannon and Vygon to initiate the pursuit and did not see a weapon or drugs on Diaz. Respondent further stated that nothing came over the radio regarding the pursuit and Vygon and Gannon did not call for backup. (Tr. 127, 129) He agreed that he did not identify himself as a police officer at any point during the pursuit and could not recall if he activated his sirens during the second part of the pursuit when he was alone in his vehicle. (Tr. 131-32)

Respondent's obligation as a uniformed member of service is to act reasonably and exercise good judgment in the performance of his duties. To establish misconduct, there must be some showing of fault on the employee's part, either that he acted intentionally (*see Reisig v. Kirby*, 62 Misc.2d 632, 635 (Sup. Ct., Suffolk County 1968), *aff'd*, 31 A.D.2d 1008 (2d Dep't 1969)), or negligently (*see McGinagle v. Town of Greenburgh*, 48 N.Y.2d 949, 951 (1979)). Mere errors of judgment, lacking in willful intent and not so unreasonable as to be considered negligence, are not a basis for finding misconduct. *See Ryan v. New York State Liquor Auth.*, 273 A.D. 576 (3d Dep't 1948). Accordingly, CCRB must prove that Respondent intentionally violated a procedural rule or was at the very least negligent in his duties in some respect in order to sustain its charges.

As noted above, the general outline of this incident was undisputed. The parties, however, are split in their interpretation of how the impact between the bicycle and car occurred. Thus, resolution of this case essentially rests on an evaluation of the credibility of the witnesses and an examination of the context in which force was used. *Gatto v. Brown*, 234 A.D.2d 22 (1st Dep't 1996).

Few things are more difficult, yet more fundamental to the role of a trier of fact, than the task of attempting to reconstruct past events on the basis of conflicting testimonial accounts. In making such determinations, the trier of fact should consider a wide range of factors, including witness demeanor, corroborating evidence, the consistency of a witness' account, the degree to which the witness is interested in the outcome of a case, and perhaps most basically the degree to which the witness' account is logical and comports with common sense and general human experience. While the law

creates this framework, the ultimate determination of which account to accept remains within the exclusive province of the fact finder.

In this case, there was little to assist the tribunal in assessing witness credibility. As is so often true, demeanor evidence was ambiguous. None of the witnesses gave much indication by their demeanor alone that they were testifying falsely. Nor, as noted above, were there any independent eyewitnesses or significant physical evidence to support or rebut the charge that Respondent struck Diaz with his vehicle. After reviewing the totality of circumstances presented at the hearing, I conclude that Respondent's description of the incident had more of the earmarks of an accurate and reasonable depiction of events as they occurred. Furthermore, I find that Respondent's acts in this instance were not intended to harm or injure the civilian but were aimed solely at what he believed to be a proper police objective.

Respondent's account of events was clear, consistent and plausible and showed no obvious evidence of embellishment. I found that he was especially candid and straightforward in his account of the factors which led him to believe he needed to stop Diaz, including factors which might not be in his favor. More importantly, I believed Respondent's assertion that as he drove up 168th Street at 30 mph he passed Diaz and noticed that he was seven to ten feet behind him. It was at this point that he parked the car in the intersection. This credible evidence that the car was ahead of the bicycle when he parked at the intersection is indicia that Respondent's intent was to block Diaz and not strike him. Based on this record I find that it is more likely than not that Respondent's vehicle was stationary when Diaz struck it with his bicycle.

At trial, CCRB argued that Respondent's admission that he parked his vehicle with the intent to block Diaz was sufficient to establish guilt. This tribunal disagrees. First, the plain language of the charge, -- that he "struck Diaz with a vehicle" -- is inapplicable to that scenario. Second, reliance on PG 212-39 Vehicle Pursuits to establish excessive force is misplaced in this particular case. Although 212-39 prohibits "placing moving Department vehicles in a position to be struck by the pursued vehicle" and "roadblocks (unless specifically directed by supervisory personnel)", this section only applies to "vehicle pursuits." PG 217-01 Vehicle Collisions, however, is listed as a "related procedure" at the end of PG 212-39 and defines "vehicle" in a manner that excludes a pedal bicycle.² The Patrol Guide's targeted definition and specific directives concerning vehicle pursuits is consistent with Departmental policies designed to protect the public from the clear dangers associated with a motorized vehicle attempting to flee the police at high speeds through city streets.

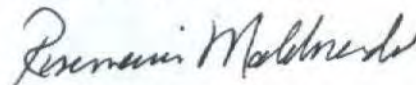
In making this finding I must note that this was a close case. Diaz was a polite young man who was understandably troubled by the injuries he sustained. The record revealed no motive for him to fabricate his account and by testifying here subjected himself to difficult questioning involving a criminal record -- something that he has left in his past. Moreover, his factual account was mostly consistent with Respondent's except for the material difference in his perception of what occurred during the critical seconds in which the collision occurred. This tribunal, however, had to take into account that during this encounter Diaz described himself as "panicked" and "scared" because he thought he was going to be robbed. Indeed Diaz was apparently so frightened he fled the location leaving

² PG 217-01: VEHICLE - Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks.

his girlfriend behind. Under those circumstances, certain misperceptions are likely to occur which could make witness accounts unreliable.

Accordingly, I find that the record before me does not support a finding that Respondent wrongfully used force against Diaz "in that he struck Rogelio Diaz with a vehicle."

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

MAR 22 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER